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No. 640

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LENA S. TILLMAN, Administratrix of the Estate of James A. Tillman, Deceased,

Petitioner,

vs.

ROBERT B. ANDERSON, Secretary of the Treasury, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF THE PETITIONER

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Correction of Questions Presented

Petitioner did not ask the Courts below or this Court "to review a decision of the Foreign Claims Settlement Commission". Petitioner seeks to declare the provisions of Section 305 of Act (69 Stat. 562) 22 U. S. C. 1641d as construed and applied by the Commission unconstitutional by arrogating to it the power to review and ignore final judgment of the State Court and attachment liens created thereby.

The Government also conveniently overlooked that petitioner's claim against Secretary Anderson is completely

independent of the constitutionality of said Section 305. It seeks declaration as to the right of the Federal Government to seize private funds of the Russo-Asiatic Bank in New York amounting concededly to over $4,000,000 and subject to her lien now worth about $300,000 without compensation and not for public purpose but for the purpose of distributing them to other private American citizens.

Petitioner also seeks determination whether her claim against Treasury Department is within the jurisdiction of the District Court or the Court of Claims.

Supplemental Argument

1. Validity of Tillman's lien.

Although the Government passed in silence confiscation of petitioner's liens without compensation and for purposes forbidden by the Federal Constitution in "Questions Presented", its brief attempts to deal with this part of petitioner's complaint under subdivision (a) of its "Argument".

The claim of the Government that the decision of Judge Rifkind in *Steingut* v. *Guaranty Trust Co.*, 58 F. Supp. 623, disposed of the validity of appellant's liens is without any foundation.

The opinion of Judge Rifkind covered two cases: The equity case of *Steingut* v. *Guaranty Trust Co.* and the case at law of *United States* v. *Guaranty Trust Co.* James A. Tillman intervened in the equity suit *but not in the action at law*. The two cases were tried together *but not consolidated*. Tillman filed his claim with Steingut, as Receiver of the Russo-Asiatic Bank, and when Judge Rifkind dismissed the equity action of Steingut, as Receiver, Tillman's claim became academic. The holding was that the United States had a superior right *to hold the funds* as against the State Receiver.

Judge Rifkind himself recognized that fact in his opinion and said at pages 623 and 642:

> "To summarize: by means of Sec. 977-b and the orders made therein, New York has gone beyond the establishment of a device for the protection of its citizens who are creditors of Russo-Asiatic (Bank) or of those who did business with it in New York; it has established a complete system of administration founded upon a policy of non-recognition of the Russian nationalization decrees insofar as New York assets are concerned. Enforcement of their policy would collide with and subtract from the Federal policy; *U. S.* v. *Pink*, 315 U. S. 203, 231; 62 S. Ct. at page 566; 86 L. Ed. 796. It must, therefore, yield * * *
>
> "On December 29, 1939, Tillman filed a claim with the receivers founded upon the same judgment.
>
> "Had the receivers prevailed in their action, Tillman could not have judgment in this action but would be relegated to his claim in receivership. Civil Practice Act, Sec. 977 (16); *Walling* v. *Miller*, 108 N. Y. 173, 15 N. E. 65, 9 Am. St. Rep. 400. *The receivers having failed, the question whether the filing of his claim with the receivers constitutes a waiver of his claim in this court, is not presented*" (citing numerous authorities).

Thus, the discussion of the alleged rights of the interveners in the equity action constituted mere dicta. Judge Rifkind concluded his opinion as follows, at page 643:

> "It follows that *in the equity action*, the complaints of the receiver's and intervenors Tillman and Millard are to be dismissed; and, the cross-claim of defendant against Millard is likewise dismissed; and *that in the two actions at law*, judgment is to be given in favor of the United States."

The Government's two law actions did not involve the validity of Tillman's liens because he was not a party to them and the Receiver's action in equity was not between Tillman and the Receiver, but between Receiver and Tillman and the Guaranty Trust Co. Tillman had no need or opportunity to litigate the validity of his lien in those three actions. Besides, the Receiver never disputed the validity of Tillman's liens and in fact paid to Tillman in 1953 $10,000.00, his alliquot share of the assets remaining in the receivership (see complaint, par. 12, J. App. pp. 7, 8).

In *U. S.* v. *Pink*, 315 U. S. 203, this Court said at page 216:

> "The Moscow case is not res judicata, *since respondent was not a party to that suit. Stone* v. *Farmers' Bank of Kentucky*, 174 U. S. 409; *Rudd* v. *Cornell*, 171 N. Y. 114, 127-128, 63 N. E. (2d) 823; *St. John* v. *Fowler*, 229 N. Y. 270, 274; 128 N. E. 199."

2. Right to review Unconstitutional Acts of the Commission.

The Government concedes that petitioner's case differs from the prior cases cited in its brief, because she "phrases her objections * * * in terms of constitutional issues" (its brief at p. 9).

The Circuit Court of Appeals itself in one of the very cases cited by the Government held that it had jurisdiction to review violations of the Federal Constitution by the Foreign Claims Settlement Commission. In *De Vegvar* v. *Gilliland*, 228 Fed. 2d, certiorari denied 350 U. S. 994, it stated (97 U. S. App. D. C. 126, 128):

> "No doubt the provisions of section 4(d) (of International Claims Settlement Act of 1949) *do not bar* certain types of judicial action. * * * No violation of Constitutional right is suggested here; plaintiff appellant make no contention, for example, that the *United States has taken her property without paying for it.*"

This is the precise contention of this petitioner.

3. The Nationality of the Claim.

Government's brief points out that 1949 Act requires in Section 305 (a) (1) that the claim "originally accrue in favor of a national of the United States". This was inserted in the act to prevent transfer by other nationals of their claims to United States citizens pending the enactment of the 1949 law. Congress considered and dealt with only two classes of Russian claims in that Act. Thus, Senate's Committee of Foreign Relations (Report 1050, 84th Cong. 1st Sess.) in reporting the Act said at pages 5, 6:

> "Russian claims are disposed of in section 305. They include *two* general classes: (1) Claims founded on liens which had been obtained prior to November 16, 1936, by United States nationals arising out of a judgment or warrant of attachment against property in the United States subsequently taken over by the Government under the Litvinov Assignment; and (2) claims of nationals of the United States against the Soviet Union arising prior to November 16, 1933, the date of the assignment. * * * Lien-claimants, it was felt, were entitled to a priority in the payment of their claims over other claims against the Soviet Government which had not attained a comparaible legal status."

James A. Tillman became a citizen and resident of the United States in 1916. He obtained his liens on the funds of the Russo Asiatic Bank in New York in 1927. These facts are undisputed. No one but Tillman either obtained or ever held his attachment liens. The Supreme Court of New York determined his ownership and the amount of his lien. When the Act of 1949 spoke of "original accrual of the claim" it clearly meant either original lien or the original unsecured claim. Tillman's lien from its origin belonged to an American national. What the Con-

mission sought to do was to investigate the basis of the decision of the New York Supreme Court and the amount of the lien as fixed by its judgment in which under the New York law the lien merged (*Ackerman* v. *Tobin*, 22 Fed. 2d 541-4).

Federal Constitution requires full faith and credit to be given by administrative agencies of the Government to final non appealable judgments of the state courts. Even federal courts cannot review the substantive or procedural merits of the final state judgments. (See pp. 16 and 17 of the main petition herein.)

In so far as the Commission claimed that it derived such powers from section 305 of the Act of 1949, that Act was and is unconstitutional. The petitioner, an interested and aggrieved citizen of the United States, seeks such declaration from the Court, and not a review of the Commission's decision in her case.

There is no question that the Congress never contemplated such result as it desired that "lien claimants" be first paid in full, so that the balance of the collected funds could be applied to payment of unsecured claims, free of liens. Congress never intended to confiscate liens without full payment. The Commission's acts to the contrary were clear violations of the constitutional limitations on governmental powers.

4. Conflict between Circuits as to right to dismiss by a motion an appeal on the merits.

We have shown in our petition (at pp. 12-14) that the Third and Fifth Circuits differed with District of Columbia Circuit on the right of the Circuit Court of Appeals to dismiss an appeal on the merits on a motion made before the argument.

The Government attempts to rely on Rule 31 (j), but that Rule clearly deals with procedural matters only. Besides, if not so confined, the Rule clearly conflicts with

Rule 19 (a), which provides: "The appellant in this court *shall* be entitled to open and conclude the case."

The practice in this Court is not a precedent for that in the Courts of Appeals. This Court has a choice of allowing or disallowing appeals to it in its discretion. The Circuit Courts have a statutory duty to hear and decide on the merits *all* appeals taken as prescribed by law. On the other hand, the Government ignores the decisions of this Court defining the nature of the motions to affirm or dismiss and their scope. Said this Court in *Sparrow v. Strong*, 70 U. S. 49, 50; 3 Wall. 97:

> "* * * it has been repeatedly held in similar cases, Minor v. Tillotson, 1 How. 288; Hecker v. Fowler, 1 Black 95, (66 U. S. 45) that *on a motion to dismiss, the court will look to the regularity of the writ and the fact of jurisdiction.* Other questions must, in general, await final hearing."

Here, the petitioner's appeal was regular in every respect, and the court below expressly held that it has jurisdiction to hear and pass on constitutional violations (*supra*, at p. 4). The Government recognized these facts as it expressly moved to dismiss "for lack of meritorious issue". (Petition, App. p. 29). Other Circuit Courts of Appeal held that the merits can be disposed of only in a plenary hearing after argument as required by U. S. C. 28, Chapt. 3, Sec. 46 (c).

CONCLUSION

For the reasons set forth in the petition and this supplement thereto, the petitioner prays that a writ of certiorari should be granted.

Respectfully submitted,

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